consequences of hostilities or warlike operations", are relieved of liability under said policy for damage to the vessel by enemy attack, solely because of frustration of the voyage by sovereign orders in a distant war area, of which the insured owner has not any knowledge, when the policy contains an express provision that notwithstanding such restraint, the insurance would cover damage by gunfire, bombs or other implements of war, and where the underwriters specially agreed, after the date on which the frustration is held to have occurred, and with knowledge that the vessel had been diverted by government orders into a zone of military control, to hold the vessel covered.

2. Whether the voyage specified in a time charter and in the policies of war risk insurance of a vessel is frustrated as a fact†, or is to be held frustrated as matter of law, by

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trict Court, and on which the Court of Appeals did not make any decision:

(a) Whether, despite any other event, the war risk insurance policies were in effect at the time of the loss on February 19, 1942.

(b) Whether the losses sustained by petitioner with respect to the *Portmar* were covered by the policies even in the absence of, but certainly in view of, the "Free of British Capture (B. C. 2)" rider.

(c) Whether the *Portmar* was a constructive total loss within the provisions of the war risk policies.

(d) Whether the tender of abandonment was sufficient.

Petitioner will contend that the decision of the District Court in petitioner's favor on questions (a), (b), (c) and (d) was right, and should be reinstated by this Court.

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† It is submitted that whether or not a frustration occurred on the uncontroverted facts of this record is a question of law which may be raised by petitioner for review by this Court. But if frustration of the voyage is to be deemed a question of fact, then in view of the observations of this Court in *Standard Oil Company of New Jersey*, v. *United States of America* (1950), 340 U. S. 54, at pages 56-57 and 58-59, petitioner seeks a review of such a question of fact because of divergence between the findings of the District Court, R. 746, 751, and the findings of the Court of Appeals, R. 793, 802.

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Supreme Court of the United States

OCTOBER TERM, 1952, No. 303

CALMAR STEAMSHIP CORPORATION,
Petitioner,

against

SYDNEY KEITH SCOTT, one of the Lloyds underwriters,

and

EDINBURGH ASSURANCE CO. LTD., NORTHERN MARITIME INSURANCE CO. LTD., FINE ART & GENERAL INSURANCE CO. LTD., BRITISH LAW AND INSURANCE CO. LTD., PLANET ASSURANCE CO. LTD., ELDERS INSURANCE CO. LTD. and NATIONAL PROVINCIAL INSURANCE CO. LTD., Insurance Companies Members of the Institute of London Underwriters,

and

EXCESS INSURANCE COMPANY LIMITED, of London, a British corporation,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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BRIEF:

I. The Decision of the United States Court of Appeals for the Second Circuit herein is in direct conflict with the decision of the House of Lords in *Rickards* v. *Forestal Land etc., Co., Ltd.*, [1942] A. C. 50 15

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Supreme Court of the United States

OCTOBER TERM, 1952, No.....

CALMAR STEAMSHIP CORPORATION,
Petitioner,

against

SYDNEY KEITH SCOTT, one of the Lloyds underwriters,

and

EDINBURGH ASSURANCE CO. LTD., NORTHERN MARITIME INSURANCE CO. LTD., FINE ART & GENERAL INSURANCE CO. LTD., BRITISH LAW AND INSURANCE CO. LTD., PLANET ASSURANCE CO. LTD., ELDERS INSURANCE CO. LTD. and NATIONAL PROVINCIAL INSURANCE CO. LTD., Insurance Companies Members of the Institute of London Underwriters,

and

EXCESS INSURANCE COMPANY LIMITED, of London, a British corporation,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Calmar Steamship Corporation, prays that a writ of certiorari be issued to review the decision and

constructive total loss because, for instance, there was no proper notice of abandonment, *still the insurance continued. As I have explained, the policy was not avoided by the deviation or change of voyage. The property in the goods still remained in the assured and was still covered by the policy.* * *"*

Lord Porter, at page 111;

"* * * From the time the master broke off from his contractual voyage to return to Germany, whether that be when he made up his mind to abandon the voyage (as Arnould seemed to think from his observations in s. 380), or whether it be when that purpose was manifested—to use the word found in the Marine Insurance Act, 1906, s. 45, sub-s. 2—or whether the true inference is that the moment to be chosen is when the ships left their last port of refuge, the owners were deprived of their goods which henceforward remained in the control of the German government and in the grip of their restraint until they were lost by the master's action in scuttling his ship. For this purpose it is immaterial that they had previously been seized. That seizure would or would not amount to a constructive total loss according to whether the assured was or was not likely to recover them and what expense he would incur in doing so. *But that loss, whether partial only or constructive and total, was by the scuttling converted into an actual total loss while the goods were still covered by the policy.*"

In the present case it was held that the war risk insurance terminated on frustration of the voyage and did not cover a constructive total loss of the vessel by enemy attack which occurred thereafter.

The decision of the Court of Appeals herein and the decision of the House of Lords in the *Rickards* case can-

not be reconciled. The conflict is clearly defined and on the precedent of *Aetna Insurance Company* v. *United Fruit Company,* (1938) 304 U. S. 430, 434, a writ of certiorari should be issued for review of the decision of the United States Court of Appeals for the Second Circuit herein.

II.

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT HEREIN AFFECTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

Any decision which strikes at the root of the war risk insurance contract affects an important question of federal law within the maritime jurisdiction of the Courts of the United States. An important question of maritime law, not settled by this Court, was ground for issuance of a writ of certiorari in *Isbrandtsen Co.* v. *Johnson,* (1952) 342 U. S. 940, 343 U. S. 779.

The decision of the Court of Appeals below was that the policies came to an end because the specified voyage was frustrated by military dominion and control of the vessel on and after her arrival at Brisbane on January 5, 1942.

The exercise of government restraint by military orders was anticipated in both the time charter and in the war risk insurance policies.

Article 2.15 of the charter provided that delivery or other disposition of the goods in accordance with Government orders or military controls would be a fulfilment of the contract voyage, and Article 2.27 provided that under such circumstances anything done or not done would not be a deviation. Similar clauses were involved in the *Rickards*

case and were the basis for the decision that there was no "deviation" when the German ship masters turned their vessels away from their voyages pursuant to orders received from the German Government. [1942] A. C. 50, 73, 108.

The "War Risk Clauses" of the present policy contained among other provisions, the "Free of British Capture" (B. C. 2) rider which excludes any claim arising from, among other causes, restraint, detainment or requisition by the British or Allied Governments (which in this case included the United States), but no such claim is made here. That rider further provides, however, that notwithstanding any such restraint, detainment or requisition, unless the vessel be condemned (as she was not), losses caused by enemy attack remain covered. The "Free of British Capture" rider is as follows: (Italics ours)

> "Notwithstanding anything to the contrary contained in this policy, it is understood and agreed that this insurance is warranted free of claims arising from Capture, Seizure, Arrest, Restraint, Detainment, Requisition, Nationalization or Condemnation by or under the authority of the government of Great Britain or any of its dominions, colonies, possessions or allies, or by any forces acting in cooperation with or under the control of them or any of them; *but unless the insured Vessel is condemned this warranty shall not exclude losses otherwise covered by this policy which are caused by gunfire, torpedoes, bombs, mines or other implements of war, or by stranding,* sinking, burning or collision, provided such losses would not be covered by a marine insurance policy (in the form hereto attached) warranted free of claims arising from Capture, Seizure, or Detention. B. C. 2."

Exhibits 6, 7 and 8, R. 70-71; R. 598.

Passing the question whether a frustration of the voyage occurred at all in view of the fact that the events held to cause a frustration of the voyage were anticipated and provided for in the charter, it is clear that the war risk insurance policies, issued on the eve of the outbreak of war, contemplated the very events which occurred and explicitly provided that notwithstanding restraint or detainment or requisition by the British Government or any of its allies, the policies would nevertheless cover damage to the insured vessel by enemy attack. The provisions of the "Free of British Capture" rider, above quoted, are clear and should be regarded, as held by the District Court, as preserving the insurance from the collapse which the Court of Appeals held to have occurred.

The Court of Appeals below has given to the war risk underwriters a gratuitous release from liability in holding that the policies ceased to cover the ship because the voyage was frustrated. In so holding, the Court stated that "We have found no decision under a marine policy which is certainly relevant" (R. 798) and thereupon cited charter frustration cases which did not involve any clauses like the modern war clauses of the present charter, and the "Free of British Capture" rider of the policies, as authority for its unprecedented conclusion. R. 798-800.

In view of Articles 2.15 and 2.27 of the charter the Court below erred in holding that the voyage was frustrated on January 5, 1942 when the vessel began to distribute her outward cargo of Government stores and munitions at various ports in Australia under the direction of United States military authorities.

Those articles of the charter expressly provided that anything done or not done under sovereign orders would

be a fulfilment of the contract voyage. But whether the voyage as specified in the charter or in the policies was frustrated or not, there is no basis for the conclusion that the war risk underwriters were released from liability under the war risk insurance policies, because the policies were not married to the charter, and contained an explicit provision in the Free of British Capture rider, quoted *ante*, p. 20, that notwithstanding governmental arrest, restraint or detainment, the policies would cover damage by enemy attack.

The "Held Covered" clause.

The present war risk insurance policies contain a "Held Covered" clause in the usual form, as follows:

> "Held covered in the event of any breach of warranty as to date of sailing or deviation or change of voyage, provided prompt notice be given these Insurers when such facts are known to the Assured and/or their managers and an additional premium paid if required." F-300.
>
> Exhibits 6, 7 and 8, R. 70-71; R. 714.

Petitioner has not made any claim under the "Held Covered" clause, because it does not apply where the diversion is under compulsion of sovereign control. That clause was designed to cover a situation where the vessel *voluntarily* deviates from the voyage specified in the policies or where there is a *voluntary* change of voyage. It prevents the termination of the insurance protection even in case the vessel may without excuse depart from the limits of the voyage specifically described in the policy.

We have never contended that the present policies were continued in effect solely by virtue of the "Held Covered"

clause, because it does not apply to a situation, and is unnecessary, where the deviation or change of voyage is *involuntary* on the part of the assured. *Rickards* v. *Forestal etc. Co. Ltd.* [1942], A. C. 50, 82-83, 109-110. Compare Section 46 of the British Marine Insurance Act, 1906, with Section 49, (a) and (d) of the same Act.

But if, as the cases hold, the "Held Covered" clause was designed to protect the assured and continue the insurance in effect, even where deviation or change of voyage occurred with the consent of the assured, then *a fortiori* the insurance should be held to continue in effect if a deviation or change of voyage occurs *without the consent or control of the assured.*

The decision of the Court of Appeals herein "that the voyage ended at Brisbane and that the policy then ceased to cover the ship" (R. 802) is wholly incompatible with the express provisions of the "Held Covered" clause.

The Special Agreement of February 6, 1942.

The foregoing petition sets forth the documents constituting the special agreement of February 6, 1942 between petitioner and the war risk underwriters that the *Portmar*, then known to be in Australia under Government orders, would be held covered pending further advices, *ante*, p. 5.

It is beyond comprehension how it could be held that the war risk insurance policies collapsed by reason of frustration of the voyage on January 5, 1942, in the light of the uncontested fact that the underwriters explicitly agreed, a month later, on February 6, 1942, thirteen days before the disaster occurred, to hold the vessel covered, knowing that the *Portmar* was then in Australia under Government orders.

Nowhere in the decision of the Court of Appeals below is there any reference to the cable sent by petitioner's brokers to Messrs. Stephens of London on January 24, 1942, and the letter from Messrs. Stephens dated February 6, 1942, initialed by all the underwriters, confirming the underwriters agreement to hold the *Portmar* covered, although those documents are fully set forth in the record (R: 586, 593) and were mentioned in petitioner's brief as appellee in the Court below. Moreover, those documents were quoted in the petition for rehearing (R. 808-809) which was denied. R. 820-821.

The diversion of the vessel from the specified voyage, or frustration of the voyage, did not affect the insurance of the safety of the vessel under the war risk policies. It is settled that the insurance remains in effect, throughout and after diversion, if the departure from the proposed voyage is involuntary on the part of the assured.

Robinson & Robinson v. *Marine Ins. Co.* (1806), 2 Johns. (N. Y.) 89;

Post v. *Phoenix Ins. Co.* (1813), 10 Johns. (N. Y.) 79;

Graham v. *Commercial Ins. Co.* (1814), 11 Johns. (N. Y.) 352;

Burgess v. *Equitable Mar. Ins. Co.* (1878), 126 Mass. 70, 79;

Audendried v. *Mercantile Mut. Ins. Co.* (1875), 60 N. Y. 482;

Aktiebolaget etc. Bank v. *American M. M. Ins. Co.* (The Ada), (1925), 241 N. Y. 197;

Scott v. *Thompson* (1805), 1 Bos. & Pul (N. R.) 181; 127 E. R. 429;

Rickards v. *Forestal etc. Co.* [1942] A. C. 50, 82-83;

British Marine Insurance Act, 1906, Section 45-(1); Section 46-(1); Section 49-(b), (d) and (e).

These were the authorities cited and on which the District Court relied in holding that the policies remained in full effect at the time of the loss. R. 745-746.

In disregard of these authorities, all cited in petitioner's brief as appellee before the Court of Appeals herein, it was held by that Court that the war risk insurance policies came to an end because the voyage was "frustrated".

The Court of Appeals below has thus rendered a decision which overturns the structure of war risk insurance of a vessel, because the life of the policy is made to depend on the continuance of the "venture" without regard to whether the cause of frustration is beyond the control, and without the consent, of the assured.

So preposterous a conclusion should not be allowed to stand, especially where the war risk policies, under the terms of the Free of British Capture rider, expressly contemplate and provide for insurance of the vessel against losses caused by enemy attack notwithstanding the sovereign restraint or control.

The questions here involved are not merely academic, nor related only to the terminated hostilities of World War II. What occurred in this case may readily occur again, because it is now familiar to all that one of the first events on the outbreak of hostilities is the exercise of governmental control over all vessels of the flag, wherever located. It is vital to shipowners and underwriters alike that the decision of the Court of Appeals herein be

reviewed and that the nature and extent of the cover of war risk insurance under such circumstances be determined by this Court.

Conclusion

THE QUESTIONS STATED IN THE PETITION SHOULD BE SETTLED BY THIS COURT.

A writ of certiorari should be issued in accordance with the prayer of the foregoing petition.

Dated New York, August 27, 1952.

Respectfully submitted,

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IRA A. CAMPBELL,
HELEN C. CUNNINGHAM,
Of Counsel.

APPENDIX I.

Pertinent Clauses of the time charter of SS. Portmar, Exhibit A, Attached to Libel, R. 18-38.

Contract MCc-1915

TIME CHARTER.

CHARTER PARTY made as of November 21, 1941, between CALMAR STEAMSHIP CORPORATION, a Delaware corporation, OWNER of the good steel steamship *Portmar* (herein called the "Vessel") with hull, machinery and equipment in a thoroughly efficient state, of about 428,116 cubic feet bale capacity and about 8600 tons (of 2240 pounds) deadweight capacity for cargo, bunkers, fresh water and stores on a mean draft of 24 feet and 0 inches on Lloyds Summer freeboard, inclusive of permanent bunkers (including deep tanks used for bunkers), which are of the capacity of about 11,992 barrels of fuel oil, and capable, when fully laden, of maintaining under good weather conditions a speed of about 9½ knots on a consumption of about 164 barrels best grade fuel oil (Bunker "C" or equivalent) per 24 hours, with gear for all derricks capable of handling lifts up to three tons, the speed and consumption being believed by the Owner to be correct, but not guaranteed, and the UNITED STATES MARITIME COMMISSION, CHARTERER:

* * *

PART I.

ARTICLE 1.01. The Owner agrees to let, and the Charterer agrees to hire the Vessel, from time of delivery, for trading for one round voyage from United States Pacific port or ports to a port or ports in the Philippine Islands, returning to U. S. North Atlantic port or ports.

ARTICLE 1.02. The rate of hire payable as provided in ARTICLE 2.03 shall be $4.70 per ton of the Vessel's dead-

reason of governmental orders to, or military restraint of, the vessel, where the time charter contains provisions anticipating such orders and restraint and providing that in such event anything done or not done shall not be deemed a deviation, and where the war risk insurance policies contain a provision that notwithstanding such event, damage to the vessel by enemy attack shall remain covered.

Reasons for Allowance of Writ of Certiorari

1. The decision herein of the United States Court of Appeals for the Second Circuit is in direct conflict with the decision of the English House of Lords in *Rickards* v. *Forestal Land etc. Co. Ltd.* (and two other cases decided in the same judgment) [1942] A. C. 50, 88, 110-116.

This Court has held that the decision of American courts in cases of marine insurance should accord respect to English maritime laws. *Queen Ins. Co. of America* v. *Globe & Rutgers Fire Ins. Co. (The Napoli)* (1924), 263 U. S. 487, 493; *Standard Oil Company of New Jersey* v. *United States of America* (1950), 340 U. S. 54, 59.

Conflict with an English decision (even of a lower court) was the basis for issuance of a writ of certiorari in *Aetna Ins. Co.* v. *United Fruit Company* (1938), 304 U. S. 430, 434.

2. The decision of the United States Court of Appeals for the Second Circuit herein affects an important question of federal law which has not been, but should be, settled by this Court. The decision below destroys the structure and cover of war risk insurance of vessels. If a policy of war risk insurance is terminated, and the insured shipowner deprived of recovery for damage sustained by the insured vessel in an enemy attack, solely because of frustration of the specified voyage by a prior military restraint and con-

trol of the vessel, even though contemplated and provided for not only in the charter of the insured vessel but also in the war risk policy, and without the knowledge or consent of the assured, then war risk insurance loses all purpose and value, and is reduced to what MacKinnon, L. J. of the Court of Appeal in *Rickards* v. *Forestal Land etc. Co.* [1941], 1 K. B. 225, 250, described as a "fatuous and worthless contract" and which, on appeal to the House of Lords, the Lord Chancellor called "perfectly useless." [1942] A. C. 50, 65.

The disastrous effect of the decision of the Court of Appeals below in the present case on policies of war risk insurance calls for consideration and review by this Court.

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued to review the decision and judgment of the United States Court of Appeals for the Second Circuit.

Dated New York, August 27, 1952.

CALMAR STEAMSHIP CORPORATION,

By EDWIN S. MURPHY,
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IRA A. CAMPBELL,
HELEN C. CUNNINGHAM,
of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT HEREIN IS IN DIRECT CONFLICT WITH THE DECISION OF THE HOUSE OF LORDS IN RICKARDS v. FORESTAL LAND ETC., CO., LTD., [1942] A. C. 50.

In the *Rickards* case, British goods on German ships at the outbreak of World War II, were carried off when the German shipmasters obeyed orders of the German Government to take refuge in neutral ports, and, if possible, to return to Germany with their cargoes, or, as a last resort, to scuttle their vessels. The goods were covered by Lloyds policies insuring against both marine and war risks. The three vessels turned away for neutral ports, and thence, with their cargoes on board, attempted to run the Allied naval blockade and get back to Germany. Two were scuttled when overhauled by Allied cruisers. The third got through to Hamburg.

There is a close parallel between the facts of the *Rickards* case and those of the present case.

In the present case as in the *Rickards* case the policies contained a warranty excluding any claim for loss by frustration of the voyage. Appendix II, page vi.* Petitioner's case does not depend on frustration of the voyage, but rests

* The warranty excluding claims for loss of or frustration of the insured voyage was adopted in 1919 to avoid the liability imposed on underwriters in *Sanday & Co.* v. *British and Foreign Marine Ins. Co.* [1916] A. C. 650. But it was held in the *Rickards* case that the insurance is not only *of the voyage*, but *of the goods* as well; and that frustration of the voyage did not terminate the insurance of the safety of the goods where the deviation was without consent of the assured. See British Marine Insurance Act, 1906, Sections 46 and 49.

on the physical damage sustained by the *Portmar*, by reason of enemy attack, and consequential expenses.

In both cases the insured property was damaged or lost by enemy action; in the present case by enemy aerial attack, in the *Rickards* case by acts of the German ships' masters who became enemies of the British cargo owners upon the declaration of war in September, 1939.

In both cases the insured property was restrained by sovereign control without the knowledge or consent of the assured. In both cases it was held that the voyage was frustrated by sovereign restraint.

With the facts thus similar the decision of the Court of Appeals below is to the same effect as the decision of the trial court in the *Rickards* case, which was reversed on appeal, and is in direct conflict with the decisions of the Court of Appeal and the House of Lords which reversed the decision of the trial court in the *Rickards* case.

The opinions of the House of Lords in the *Rickards* case held that while constructive total loss of the goods may have occurred when the German masters of the three ships left their voyages to proceed to neutral ports, or may have occurred later when they sailed from neutral ports to run the Allied naval blockade in their attempt to reach German ports, pursuant to the orders of the German government, the goods certainly became an actual total loss thereafter by scuttling of two of the ships when overhauled by cruisers of the Allies, and by escape of the third to Hamburg; that whether the loss be deemed to have occurred on deviation to neutral ports, or on leaving neutral ports to run the blockade, or on scuttling or arrival in a German port as the event occurred, *the policies remained in effect and covered the actual total loss of the goods.* See [1942] A. C. 50, 88, 111.

In the Court of Appeal, in dealing with the underwriters' contentions and the decision of the trial judge, Mackinnon, L. J. said, [1941] 1 K. B. 225 at page 250:

> "I think it is unnecesssary to discuss further this misconception as to the nature of a policy on goods. I would only add that, if Hilbery J.'s view were correct, the assured under this policy must have accepted the most fatuous and worthless contract ever made by a sane man. The policy solemnly insures his goods against loss by war perils and his being thereby deprived of them, but the frustration clause, on the judge's reasoning, would in every case of such deprivation that I can imagine make that promise absolutely nugatory!"

The following quotations from the opinions in *Rickards v. Forestal Land etc., Co. Ltd.*, [1942], A. C. 50, show that the war risk insurance of the goods did not terminate when the voyages were frustrated, but remained in effect and covered the actual total loss of the goods: -(Italics ours)

Lord Wright, at page 88;

> "• • • Mr. Miller strenuously contended that, if there was a constructive total loss, which did not give the assured a claim because it was one for which, in virtue of the frustration clause, the underwriter was not liable, all possible claims under the policy were excluded, even though in the end the goods were totally lost by an insured peril. This argument found favour with the trial judge. *It led MacKinnon L. J. to some severe strictures on the futility of such an insurance or pretended insurance against war risks and on its utterly unbusinesslike character. I agree with these strictures.* But with all respect to the learned judge, the arguments are based on a misconception, quite apart from the effect of the frustration clause. If the sailing from Rio under the orders of the German government did not give a claim to a